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Democratic Control of the Council of Ministers

Dieser Beitrag untersucht den Begriff der „dualen Repräsentation“ und den darin enthaltenen Anspruch, dass einzelne Mitglieder des Rats der Europäischen Union von ihren nationalen Parlamenten politisch zur Rechenschaft gezogen werden können, während der Rat als Ganzes im Rahmen eines Systems der „checks & balances“ dem Europäischen Parlament verantwortlich ist. Der Beitrag evaluiert eine Reihe möglicher Beschränkungen der Kapazität nationaler Parlamente, das Verhalten ihre eigenen Regierungen im EU-Rat zu kontrollieren, einschließlich der Entscheidungsregeln der Union, der Intransparenz des Rates, von Informationsasymmetrien und der Struktur der nationalen politischen Systeme. Was das Europäische Parlament anlangt, argumentiert der Beitrag, dass dessen Macht schon dadurch beschränkt ist, dass es den Rat nicht kontrollieren, sondern nur über ein System der „checks & balances“ beaufsichtigen soll. In dem Ausmaß, in dem diese Beschränkungen ihrerseits die Politisierung der ParlamentarierInnen und deren Wahl auf der Grundlage von Wettbewerb und einer für das Funktionieren der Union relevanten Auswahl verhindern, stellt die „duale Repräsentation“ selbst ein Hindernis für die Entwicklung „direkter“ Repräsentation in der EU-Arena dar.

*Keywords: representation, democracy, Council of Ministers, European Parliament, national parliament
Repräsentation, Demokratie, Rat der Europäischen Union, Europäisches Parlament, nationales Parlament*

1. Introduction

The draft Treaty establishing a Constitution for the European Union contained a section entitled the ‘democratic life of the Union’ (A1-46). After proclaiming that ‘the functioning of the Union shall be founded on representative democracy’ the section stated that ‘citizens are directly represented at Union level in the European Parliament’ and ‘Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens’ (*Official Journal of the European Union*, C310/1-474, 2004). Yet, the claim that the Union is open to dual democratic representation and control became common

place in the statements of member governments and Union institutions long before the Constitutional Treaty. Typical of the genre is Tony Blair’s contribution to the future of Europe debate in 2000. After claiming that ‘the directly elected and representative institutions of the nation states – the national governments and parliaments – are the primary sources’ of democratic control at Union level, Blair went on to argue that ‘the European Parliament is’ none the less ‘a vital part of the checks and balances of the EU’ (UK Government 2000).

This article evaluates the notion that members of the Council of Ministers can be *individually* responsible to national democratic institutions whilst being *collectively* checked and balanced by the European Parliament. The evaluation assumes that public control with po-

litical equality are the core attributes of democracy (Beetham 1994, 28; Weale 1999, 14) and that popularly elected representative bodies are necessary – though not always sufficient – to secure those attributes. This, in turn, raises questions of institutional design that are best introduced by means of the following quotation from John Stuart Mill's *Representative Government* (1972 [1861], 229):

It is an open question what actual functions ... should be discharged by the representative body. Great varieties are compatible with the essence of representative government, provided the functions are such as to secure to the representative body the control of everything in the last resort.

In effect, then, Mill assumes that public control can be multidisciplinary (it can take a variety of means) provided it is comprehensive in scope (it covers all public policy) and it is singular (it is exercised by a single representative body). Although this last assumption of singularity is typical of parliamentary systems (Strøm 2003, 66), the notion of dual representation at Union level clearly departs from it. If, indeed, there is any substance to dual representation it would imply the Union has some similarities with the multiple competing centres of public control associated with presidential systems, though with two differences. First, the Union does not of course have a single chief executive. Second, the different representative bodies with a controlling role in EU matters belong to different political systems and constitutional orders. Attempts to co-ordinate incentives and norms to produce specific governance standards are thus likely to be more complex, uneven and problematic than in single state systems.

In spite of such differences, it is understandable why multi-polar forms of public control might be thought best for the Union. First, the absence of a European Union demos probably precludes the concentrated forms of public control associated with conventional parliamentary politics.

Second, a dispersion of controlling powers between mutually watchful representatives elected at different levels may be a good sec-

ond-best solution (Héritier 1997), so long as there are constraints on how far any representation at Union level can be 'direct' in the full sense of the term. Even members of the one representative institution that is directly elected at the Union level do not often seem to be elected on the basis of competition and choice relevant to the operation of the Union itself (Reif/Schmitt 1980; though, also see Schmitt/Thomassen 2000). We will return to this problem in the conclusion.

Third, the Union, arguably, typifies developments in modern governance that have called into question the possibility – as Giandomenico Majone (2005, 85) puts it – of 'control being exercised from one fixed point on the political spectrum'. Organisation of expertise needed for effective policy delivery increasingly requires policy-makers to operate in networks which challenge the political and administrative chains of delegation by which responsibility to representative bodies has been secured in the past. Thus, in the case of the European Union, representative bodies may secure less control by following formal demarcations of who is responsible for what; and more by recognising that the real locus of decision-making may often lie in the collaborations and shared assumptions that bring together policy specialists from different Union institutions, from the national and Union levels, and even from the private and public spheres (Jachtenfuchs 2001; Kohler-Koch 1996).

Such conditions of procedural and substantive complexity may not invalidate conventional accounts of representation that emphasise a need to relate all issues to all others, and relate that blend, in turn, to common sense understandings of the needs and values. But greater complexity in the executive processes they seek to control does require representative bodies to ground their general understandings of policy problems in access to more specialised forms of expertise that can only be cultivated through divisions of labour between representatives themselves. On the one hand, the thematic complexity of policy may require those divisions of labour to be multi-disciplinary (i.e. organised for the accumulation and deployment of different control-

ling skills). On the other, the spatial complexity of policy may require the divisions of labour to be multi-level (i.e. to operate simultaneously at the EU, national and sub-national levels).

In sum, then, dual representation amounts to a claim that national parliaments and the EP should *interact* to produce satisfactory standards of public control, and that neither should be expected to be sufficient on its own. Yet, the roles in Union matters of national parliaments and of the European Parliament have hitherto been studied more in isolation than in interaction. To correct this would be a huge undertaking. This article attempts a modest beginning. In the hope of motivating and facilitating further research into where the limitations of the two components of dual representation are mutually compounding, mutually compensating or neither, the article evaluates the individual responsibility of Council Members to national parliaments (section 2) and the collective capacity of the EP to check and balance Council decisions (section 3). A concluding section then summarises shortcomings in the two roles.

2. Responsibility of Individual Council Members to Ministers to National Parliaments

Whatever their role in Treaty authorisation, are national parliaments in any position to exercise continuing control of Council decisions? The broad facts of their involvement are well-known. Under a legally binding protocol to the Amsterdam Treaty, draft legislation, Commission White and Green Papers and Communications, and all documents related to the 'creation of an area of Freedom and Justice' (mainly JHA) have to be forwarded to national parliaments six weeks before they are put on the Council's agenda (Treaty on European Union, protocol 9). In some Member States, control of the Union's agenda can be further aligned with the needs of national parliaments through scrutiny reserves, which limit the right of ministers to agree matters in the Council that are still under consideration in their parliaments.

Yet, national parliaments are quite different in the diligence of their scrutiny and in their powers to act on it. Only some can issue instructions their governments are either legally or politically obliged to follow. Following the 2004 enlargement, the Conference of the European Affairs Committees of the Parliaments of the European Union (COSAC) classifies Austria, Denmark, Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia and Sweden as Member States whose parliaments can mandate governments to take a particular position in the Council. Of these COSAC describes all but the Austrian and Hungarian parliaments as having arrangements for systematic mandating where 'governments are in principle obliged to present a negotiating position to the committees on all pieces of draft legislation to be adopted by the Council'. The Lithuanian parliament classifies issues as 'red', 'yellow' and 'green' in the expectation that in the first two cases its government will present it with a negotiating position for parliamentary approval 15 days before a Council decision (COSAC 2005a, 12). Also worth noting is that the Dutch and German Parliaments have partial mandating powers (respectively over pillar three decisions and matters touching on the competence of the *Länder*). Indeed, the German *Länder* demonstrate how 'democratic principals' can even be incorporated into national delegations to Council meetings. For all the remainder of cases not mentioned in this paragraph, national parliaments, have, in the words of a report prepared for the Convention, 'more or less effective systems for expressing their views on a legislative proposal, while leaving their respective governments free to decide whether to take them into account' (European Convention 2002, 6).

Still, whatever their powers, national parliaments are widely believed to experience common constraints in exercising public control over the behaviour of their own governments in the Council. The paragraphs that follow analyse constraints that relate to the Union's decision-rules, the opacity of the Council, informational costs of scrutinising another political system,

and the varied character of executive-legislature relations in Member States.

The relationship between Council voting rules and the role of national parliaments presents something of a puzzle. Although the empowerment of the European Parliament has been justified on the grounds that governments cannot be held responsible to their own parliaments for decisions on which they may have been out-voted in the Council, national parliamentary involvement in Union matters has not decreased with the development since the 1980s of a more majoritarian Council. To the contrary, it is only in the last twenty years that the practice of designating at least one national parliamentary committee with responsibility for European Community Affairs has been generalised to most Member States. Most telling of all, the national parliaments of all but two of the 13 Member States which joined in 1995 and 2004 (Cyprus and Malta) chose to use their influence over Treaty ratification to secure some powers to mandate the behaviour of their governments in the Council.

This increased national parliamentary involvement may well be a response to the greater weight and visibility of Council decisions in the ordinary lives of voters in the post-Maastricht European Union. In some Member States it may also be the product of an increased politicisation of Union issues in the processes by which national parliamentarians are elected and compete for office. It is thus possible that greater Europeanisation of the domestic arena has stimulated national parliamentary involvement in Union matters at the very moment that institutional developments have made the European arena less tractable to their control. It would, however, be a mistake to over-state how far majority voting in the Council departs from procedurally ideal conditions for national parliamentary control. For the most part, the Council continues to decide by consensus even where majority voting is available to it (Mattila/Lane 2001).

Turning from decision-rules to problems of transparency, modern scholars identify asymmetries of information as amongst the principal

means by which modern executives dominate legislatures (Krehbiel 1991). Thus it is already a challenge to national parliaments that the complexity of Union policies and institutions often require a special expertise that is costly for those who have no permanent presence within the Union's political system to acquire and sustain. As one MEP interviewed for the Democratic Audit of the EU put it: 'It is an institutional system that you really do need to experience directly if you are to understand it. I have often found that those who visit for even 2-3 days have a grasp that is not shared by others' (Lord 2004, 181).

Such difficulties are compounded by the closed nature of Council decision-making. Although the results of Council votes are published (European Community Treaty, A. 207 (3)) opportunities for publics and their representatives to follow the deliberations of the Council prior to voting are more limited. At the time of writing, the Council only holds open meetings at the very beginning and at the very end of Co-decision – when the Commission presents its proposals and when the Council agrees a final text (COSAC 2005b, 44). Not only does this challenge the principle that all legislation should be a public act, but the restriction of open meetings to Co-decision, rather than Consultation, bizarrely implies that the closer the Council approximates the role of sole legislator without check and balance from the publicly visible European Parliament, the more secretive should be its deliberations.

In addition to raising the cost of monitoring the behaviour of their governments in the Council, non-transparency may dampen the incentive for national parliamentarians to invest their time into the scrutiny of Union decisions. Given evidence of successive Eurobarometers that the Council is the least known of the four main Union institutions (Lord 2004, 57) – even though it is, arguably, the most powerful – and focus group evidence that several national publics see their own governments as mere bystanders to Union decisions (European Commission 2000), voters are unlikely to reward or sanction their parliamentarians for scrutinising Council

decisions, or even to be aware that opportunity is available.

Even, however, if they had perfect information about Council deliberations and decision-making, national parliaments would still face the costs of converting that information into a full and effective scrutiny. As Tapio Raunio (1999, 188) remarks, only national parliaments whose EACs meet weekly are likely to be engaged in line-by-line scrutiny of Union business. In the case of those parliaments which practice what COSAC calls 'documentary scrutiny' (the sifting of all texts received under the Amsterdam protocol) a small and stable group of representatives has to be delegated to perform the task on behalf of the parliament as a whole if monitoring is to benefit from the likelihood that understanding of the Union is governed by increasing returns: that it is, in other words, a capability that grows with use. Yet a tension can be expected between such a division of labour and the general-purpose nature of both national parliaments and of the Union's own decision-making. Several national parliaments have thus felt compelled to attempt a difficult balance between diffusing the coverage of Union affairs across a range of committees, whilst concentrating a co-ordinating role in the hands of a few representatives with a more permanent focus on European issues (COSAC 2005a, 13-15).

The EU's extended policy cycle presents a further challenge. In addition to monitoring actual decisions of the Council, national parliaments are likely to be constrained in their controlling role if they are not also active when choices are structured in interaction with the Commission, restructured in interaction with the European Parliament, and then fleshed out into detailed implementation rules through comitology. Some examples from the experience of the Scandinavian parliaments illustrate the scale of the effort that may be required.

At the agenda-setting stage, the Danish Folketing holds public hearings on Green and White Papers. Parliamentary resolutions based on the hearings are then forwarded to the Commission (Folketinget 2002, 10). For its part, the Finnish Parliament tries to influence the prepa-

ration of Council decisions by writing reports that it then expects national officials to take into account when participating in COREPER or Council working groups.

In order to handle the converse risk that the Union's multi-stage decision-making may drift substantially from the options on which its has had an opportunity to express a view, the Swedish parliament (*Riksdag*) expects Ministers to remain over the course of Council bargaining in continuous contact with the Chair of the EAC, who will, in turn, telephone the leading committee member from each of the other political parties to consult on any proposed deviation from the parliament's original position. Minutes and voting records of Council meetings are then used to check that the government has kept to its commitments. The Swedish Government also 'has to submit a written report of the position that it has taken within 5 days of each Council meeting, explaining what positions it has backed and why'. Where the Government departs from a mandate, the *Riksdag*'s EAC reserves the right to take a vote on whether the deviation was justified and all MPs can pick up on any embarrassment of the government through 'interpellations' in the full parliament (Hegeland/Neuhold 2002, 6).

By way of a postscript, it is also worth mentioning that even arrangements as elaborate as the foregoing are limited in how far they can follow national parliamentary scrutiny through to what is in many ways the final stage in European Community rule-making, namely the use by Member States of Comitology committees to oversee the Commission in the preparation of guidelines for implementation. Since Comitology is not covered by the Treaty protocol on documents which must be supplied to national parliaments for their scrutiny, national parliaments must be sufficiently organised to follow it for themselves by inspecting the Commission's register of Comitology. A possible reason why they have only rarely been motivated to do this in practice (COSAC 2006, 28) is that Comitology only comes into play once Community measures already have the force of law and all Member States are any how obliged to

proceed with them in some form. Moreover, any systematic attempt to extend scrutiny to Comitology would hugely increase the time and resources national parliaments have to give to Union matters. As COSAC points out, the Union passes ten times as many implementing measures as it passes full pieces of legislation. In 2004, for example, the figures were respectively 2625 and 278 (*cit*, 26-7).

In any case, it is unlikely that rigorous scrutiny procedures are sufficient to hold governments individually responsible to their national parliaments for their behaviour in the Council. Much depends on how far governments can themselves control scrutiny committees. That, in turn, depends on the overall structure of executive-legislative relations in each Member State, and on party disciplines. Consider the example of the United Kingdom. Although it has experienced a politicisation of Union issues that has motivated other national parliaments to press for indirect participation in Council decisions (Johanssen/Raunio 2001), the Westminster Parliament arguably combines one of the most painstaking with one of the most inconsequential of scrutiny procedures. Whilst the Commons scrutiny committee can force a debate of the whole House, rules on parliamentary time limit the number of occasions this is possible, and, in any case, the government majority is always available to defeat a challenge (Giddings/Drewry 1996). Indeed, the Government can use its majority to over-ride a scrutiny reserve and proceed to a decision in the Council before the Commons committee has completed its work. There were 22 over-rides in the second half of 2004 alone (COSAC 2005a, 11). Austria provides a further example. Although the only national parliament with the power to issue legally binding mandates, party disciplines ensure this is rare in practice (Hegeland/Neuhold 2002).

In other cases, powerful controls over the behaviour of national governments in the Council are better understood as *effects* of prior executive weakness in domestic systems, as opposed to transposable *causes* of national parliamentary strength in the European arena. Na-

tional parliamentary mandating evolved in Denmark in response to conditions that are most unlikely to be reproduced in many other Member States. Some means had to be found of determining how to use the Council decisions rights assigned to a Member State where, as David Arter (1999, 119-20) puts it, Governments are typically so much in the minority that it is 'opposition parties ... that make decisions in practice'.

In sum, then, this section has appraised difficulties in holding members of the Council individually responsible to national parliaments that arise from Council voting rules, the opacity of the Council, the opportunity costs in parliamentary time of scrutinising Union decisions and variations in executive-legislature relations across Member States. It suggests that the first constraint has been over-stated. The second and third constraints are important, though probably best understood as an aggravation by the Union's complex institutions of a general difficulty faced by modern parliaments, namely asymmetries of information in their dealings with the executive bodies they are supposed to scrutinise. The fourth constraint affects some national parliaments significantly more than others.

A little noticed corollary of this last point is that exclusive reliance on national parliaments would risk political inequality. How well individuals can be represented at Union level will depend on where they live. How far they can look to national parliaments to monitor Council decisions and enforce standards of responsibility depends on executive-legislature relations in each Member State. Where QMV really is used, much will also depend on the decision weights assigned to each country, a point not lost on those commentators who use power indices to demonstrate that the 5 largest States of the EU-25 are between 8 to 9 times more likely than the 5 smallest to be pivotal to winning or blocking coalitions of the Council (Paterson/Silársky 2003, 10; Strøm et al. 2003, 668).

Nor are national parliaments likely on their own to meet the deliberative conditions for democracy. Short of Europeanising themselves into an inter-parliamentary network that allowed

each to reflect on the preferences of all, national parliaments can only secure control over individual Council Members in ways that open them to Edmund Burke's (1975 [1774], 175) famous objection: 'what sort of reason is it in which the determination precedes the discussion, in which one set of men deliberate and another decide, and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?'

Of course, one possible riposte to all of this is that the responsibility of individual Council Members to national parliaments is not supposed to produce collective democratic standards at the European level. Matters would, however, be more serious if the converse could be demonstrated, namely that the collective operation of the Council unnecessarily compromises individual responsibility to national parliaments. More systematic research is needed to investigate whether this is indeed the case. But survey and interview evidence already provides *prima facie* cause for concern. COSAC surveys and plenaries suggest national parliaments do feel themselves constrained by *faits accomplis* which emerge from bargaining relationships and decision-rules of which they can influence but a part. Typical is a complaint by the representative of the Irish Dail that texts often have an air of having already 'been passed by governments' before they are forwarded to their national parliaments (COSAC 2001, 33). Even national parliaments with the most rigorous procedures for rendering their own governments individually responsible for their contributions to Union decisions, acknowledge a need to adapt their own parliamentary control to distributions of power and preferences between other Council members. That, for example, is the implication of a claim by an official of the Danish *Folketing* that his own parliament has adapted to QMV by concentrating its scrutiny on those cases where its government is most likely to be pivotal in the Council (Lord 2004, 177).

By way of postscript it is, of course, possible that things could change significantly if anything akin to the proposal in the Draft Treaty establishing a Constitution allowing national

parliaments to challenge Commission proposals on the basis of subsidiarity is adopted. Under such circumstances there would be strategic advantage – and thus a competitive pressure – on Member States to ensure their parliaments have the power and expertise on Union issues to network with others to form the one-third of national parliaments needed to trigger a challenge.

3. Checks and Balances? The European Parliament and the Council

If there are limits to how far the Council can be made accountable through the relationship of its individual members to their national parliaments, does the Union compensate for these in arrangements for the Council to be accountable as a body to the EP? Responses to a survey for the Democratic Audit of the European Union indicate MEPs are much less confident of their public control of the Council than the Commission. MEPs on average rate their capacity to influence the Council at 3.23 on a scale of 0–10. MEPs find the Council less transparent than the Commission and better placed to evade responsibility by blaming someone else. When asked to indicate how far non-transparency and blame-shifting were obstacles to accountability, MEPs answered 5.4 and 3.71 in the case of the Commission and 8.57 and 6.47 in that of the Council (all figures on a scale of 0–10). MEPs also feel Council Members see themselves as primarily responsible to their national parliaments, while Council Presidencies vary in their willingness to explain decisions to the EP. Given that MEPs are less confident of their powers to control the Council than the Commission, many are understandably nervous that legislative and executive powers may be drifting from the second to the first (Lord 2004, 183).

But how justified is the pessimism of MEPs about their powers to control the Council? Does a more favourable assessment emerge once we acknowledge that 'supervisory' forms of control are neither possible nor appropriate in the relationship between the EP and the Council,

whilst a system of mutually constraining checks and balances is feasible?

If the EP really does have the capacity to check and balance the Council, we would expect confirmation in studies of its legislative and financial powers. Given that the Commission frequently exercises its legislative initiative in response to what member governments perceive to be a need for Union-level law-making, it is by no means far-fetched to interpret Co-decision as conferring a power on the EP to deny the Council its legislation in a polity whose main business is rule-making (Majone 2005, 37). Council Members may accept significant EP amendments rather than 'return to go' in a lengthy legislative process that may have depended on unique windows of opportunity in domestic politics or on a complex 'log-roll' between themselves.

In addition to conferring veto powers, Co-decision may allow the Parliament 'agenda-setting' opportunities. As George Tsebelis (1994) first pointed out in his study of legislative powers that have subsequently been subsumed into Co-decision, it is 'procedurally easier' for the Council to accept Parliamentary amendments. Whereas it may only need a qualified majority to adopt as a final text a revised Commission proposal incorporating EP amendments, it needs unanimity to substitute an alternative of its own.

Yet, in spite of some high profile clashes between the EP and the Council in individual Co-decisions, the aggregate data can be read as suggesting that the EP is somewhat tame in its efforts to check the Council in the legislative process. It is relatively rare for Co-decisions to be lost on account of an EP veto. It is also increasingly common for Council, EP and Commission to collude through trialogues to manage the legislative process. A declining proportion of Co-decisions 'go to the wire' in the sense of requiring a Conciliation committee to be convened between the Parliament and Council (COSAC 2005b, 48- 51).

In any case, many of the Parliament's powers amount to a series of 'bounded choices'. Assuming, that it does not often want to veto matters out-right, and that its main objective is

to pass the measure but with amendments of its own, the EP can only check and balance the Commission and Council within limits determined by the distribution of preferences within those other institutions. Amie Kreppel (2000) has analysed this most clearly in relation to legislation. However, the bounded nature of choices available to the EP can also be illustrated through the example of its budgetary powers. In relation to annual budgets:

- The EP has no powers over the revenue component of the budget;
- the EP's powers of amendment are only procedurally strong in relation to the 54 per cent of the budget consisting of non-compulsory expenditure;
- even then, the EP is only able to vary non-compulsory expenditure up to a 'maximum rate of increase' of about 3 per cent a year;
- the EP has to keep to a number of sub-ceilings laid down in seven year financial perspectives (Laffan 1997).

EP amendments typically only increase the overall budget by around EUR 1m or one per cent of the total. Since this roughly corresponds to what the Council normally shaves off the Commission's proposal in the first place, some MEPs have suggested that the whole process approaches an empty ritual: 'the Commission presents a proposal, the Council takes a slice off the proposed amount, the EP adds a bit more in, and we are supposed to come up with something wonderful in conciliation' (Kathalijne Buitenweg MEP, Debates of the European Parliament, 11 December 2001).

Moving beyond annual budgetary rounds, a further difficulty concerns the longer-term seven year frameworks which govern the finances of the Union. As the Parliament has noted as recently as its report on the 2006 inter-institutional agreement on budgetary discipline, a seven year cycle necessarily means that financial frameworks are not aligned with five year mandates of the Commission and the Parliament. In the EP's view such an alignment would significantly improve political responsibility for the expendi-

ture of the Union's resources (European Parliament 2006a, 7).

Still, a case can be made that bounded choice is precisely what is to be expected in a system of checks and balances whose purpose is precisely that no institution – the EP included – should be able to dominate the others. A more fundamental difficulty may be that demarcations between decisions where the EP does and does not have the power to check and balance the Council sometimes appear more expedient than principled.

Paul Magnette's (1999) description of the EU as 'semi-parliamentary' might be a harmless statement of the obvious were it simply a corollary of another *bon mot*, namely Philippe Schmitter's observation that the Union really amounts to a 'plurality of polities at different levels of aggregation'. However, the involvement of the EP does not map neatly on to a distinction between Union decisions that employ 'supranational' and 'intergovernmental' modes of aggregation. On the one hand the EP is excluded from parts of the first pillar where a case can be made that decision rules, preference distributions and power relations operate with sufficient autonomy in the European arena to require parliamentary control at that level. On the other hand the EP pops up unexpectedly in pillars two and three (Lord 2005), yet without a consistency likely to satisfy those who believe that all decisions taken at Union level should be controlled by a Parliament at that level and with expertise of it. The following paragraphs elaborate.

Andreas Maurer's (2003) distinction between 'strong' (Co-decision and assent procedures) and 'weak' (Consultation procedure) parliamentary inclusion implies that even under pillar one Council decisions are still only selectively checked and balanced by the EP. Included amongst cases where the EP is only consulted are some instances where the Council decides by QMV, even though, as seen, that particular combination of decision rules implies that parliamentary control may be weak at both the national and the European levels. As the Finnish Parliament has put it, the 'democratic deficit

becomes most obvious where the Council takes decisions by QMV without the European Parliament being able to prevent the legislation coming into being' (quoted European Parliament 1997, 12). It is also worth noting that the EP complains about absence of full budgetary as well as of full legislative Co-decision. It is unclear how real is the difference between compulsory and non-compulsory expenditure and why that distinction should justify conferring fewer powers on the EP over the first than the second. Indeed, the EP suspects the real intention is to 'cordon off' the Union's main expenditure policy – the CAP – from its control (*cit.*, 16).

Yet even where its legislative and financial powers are at their maximum, the EP has – at least until recently – argued that Comitology allows Member States partially to negate the benefits of using a directly elected Co-decider as a check and a balance on the Council. In the EP's view, Comitology committees do not 'merely implement' but 'modify and 'supplement essential aspects of legislative provisions' (European Parliament 1998, 6/2003, 7). Thus they allow administrators and experts appointed by the Member States to make substantive choices about the allocation of values that should be Co-decided by the Parliament and Council. It remains to be seen how far a new inter-institutional agreement concluded in 2006 will resolve these problems. The rapporteur on the agreement, Richard Corbett, concluded that it did put the EP on an 'equal footing' with the Council in being able to scrutinize and then reject implementing measures which amount to delegated legislation, rather than mere policy execution. However, Corbett also notes that the inter-institutional agreement does not go so far as the Constitutional Treaty which would also have allowed the Parliament to revoke the delegation of powers once made (European Parliament 2006b, 5).

Turning to the second and third pillars, the Treaty only requires the Council to consult the EP on CFSP and JHA decisions and to report annually on the overall development of the two policies. Yet, the EP has expressed concern that

the Council has used CFSP and JHA to delegate powers to unaccountable agencies. Council agencies do not have executives whose maladministration can occasion censure by the EP. Nor are they covered by general legislation on administrative standards in Union institutions such as the regulations on the processing of personal data and access to documents. Moreover, the exclusion of the ECJ from all of CFSP and much of JHA means that lacunae in responsibility to elected bodies are not compensated by judicial accountability or individual rights protections (European Parliament 2001b).

In the case of JHA, Council agencies include Europol (police co-operation), Eurojust (prosecuting magistrates), and the Schengen Secretariat (Frontier management). Although they are mainly co-ordinating mechanisms, Council agencies seem on occasions to exercise discretionary powers. The Europol Director, for example, has been authorised by the Council to enter discussions with third countries on behalf of the Union (O.J.C. 106, 13 April 2000). Above all, the agencies are key sites for the transposition of JHA orientations into policing on the ground. Eurojust has been authorised to initiate joint investigations and prosecutions in cases of cross-border crime, and to make joint recommendations to Member States on changes to criminal law in each country. Plans to create a joint Police training College – and to exchange ‘best practice’ – imply norms of policing may in the future be partially defined through collaborative processes at European level, rather than exclusively through agencies that are locally or nationally accountable. Amongst priorities the Council set for the College were ‘training sessions for senior national police officers on the basis of common standards’ (European Parliament 2001c).

4. Conclusion

EU institutions and its Member States often claim that public control of the Union is possible through a system of dual representation. Amongst other things, this implies that the in-

dividual members of the Council can be accountable to national parliaments, whilst the decisions of the Council as a whole can be checked and balanced by the EP at the level of the EU’s political system itself. Clarity of exposition demands that the two processes be analysed separately from one another, and this article has not attempted to deviate from that conventional path. Yet, as discussed in the introduction, the notion of dual representation is ultimately a claim that national parliaments and the European Parliament can *interact* to produce satisfactory democratic control of Union decisions. Not only is there little academic research into the interaction of the two roles, but, one suspects, political practice has itself only tested a narrow range of the possibilities for either co-operation or mutual watchfulness in the relationship between national parliaments and the European Parliament in their monitoring of the Council.

Still, some conjectures can already be attempted. To the extent that an understanding of what can be changed and what cannot contributes to institutional design, a useful starting point might be to hypothesise what constraints on dual representation are likely to be structural in the sense that they can be expected to arise even where national parliaments or the European Parliament perform their allotted roles. For example it is hard to see how EP’s complaint that ‘neither the Council nor the European Council can incur ultimate political censure, since no vote of confidence is possible either in national parliaments or the European Parliament’ (European Parliament 1997, 5) could ever be satisfied within a dual system of representation. National parliaments can only control individual Council Members and in a system of shared representation it is hardly for the EP to control by whom Member States want to be represented in the Council. Dual representation is thus closely related to Joe Weiler’s (1997, 275) observation that ‘critically there is no real sense in which the European process allows the electorate to “throw the scoundrels out”... to replace one *set* (my emphasis) of “governors” by another’. Dual representation can accommodate the power of

national parliaments to remove individual Council Members and that of the EP to censure the Commission but with respect to the residue left over after these two powers have been taken into account – control of the Council and European Council as collective bodies – it requires confidence in means other than dismissal from office.

If dual representation constrains any representative body from exercising an over-arching public control of the Union, what structural constraints does it imply for national parliaments or the EP only? On the strength of this article we might predict that even national parliaments with strong controlling powers over the behaviour of their governments in the Council will struggle on their own to deliver the political equality or the deliberative conditions for democracy at the European Union level. We might also predict that any difficulties national parliaments face in constraining the collective operation of Council decision-making will limit their individual powers.

Turning to the European Parliament, it follows directly from the very notion of dual representation that the EP will only be able to check and balance the Council within certain bounds. From that we might, in turn, predict that dual representation will operate as a structural limitation on direct representation itself. As seen, the Union has failed to develop the politics of direct representation – in the sense of elections contested on choices relevant to the operation of the Union itself – although it has a directly elected Parliament. A possible reason for this is that the opportunity to decide who is going to exercise the European Parliament's *part* share in the powers of an institutional order whose capacity to re-allocate values is incremental, dependent on high-levels of consensus, and, arguably, substantially pre-decided by prior processes of Treaty formation is a weak mobilising force (Bartolini 2005; Blondel et al. 1998, 251-3; Mair 2005). In contrast, national parliamentary elections designate (if only indirectly) the range of key legislative and executive offices in what Kaare Strøm (2003, 65) calls a singular chain of delegation. Indeed, they even

confer a part share in Union decision-making, a factor that may paradoxically even depress turnout in European elections in those Member States where national parliaments are thought broadly capable of controlling the contribution of their own governments to Council decisions. Yet as also seen, it is hard to imagine any departure from dual representation given the Union's under-developed demos and its need to negotiate its policies with its Member States if they are to be carried out on the ground. As Phillip Dann (2006, 238) puts it, 'since EU law is implemented by national administrations' those same administrations have to be given 'voice' in the 'making of laws'.

All of this suggests a theoretical framework for appraising options for institutional reform. In contrast to Fritz Scharpf's (1999, 188) well-known suggestion that the European level should concentrate on meeting output conditions for democracy (capacities for collective action in economic and social policy) and the national level on meeting 'input' conditions (demos, parties, media and so on), this article has discussed an alternative division of labour constructed around the distinction between individual and collective responsibility. Taking accountability as an essential ingredient of responsibility, further development of this division of labour might be appraised for what it could do to encourage participants in the Council to give reasons for their decisions subject to threats of sanction where the public or its representatives consider explanations inadequate.

A few observations about the political opportunity structure all this implies for reform are in order, even though space does not permit consideration of concrete options. Any success on the part of one Parliament at either level in improving the quality of 'reason-giving' for Council decisions will be a public good with all the qualities and shortcomings that implies. To the extent that the development of expertise and the extraction of information are not cost-free, there will be a tendency for the public good to be under-supplied. But once the information is available other parliaments cannot be excluded from it.

Turning now to the issue of sanctions, different possibilities suggest themselves at the two levels. Sanction through loss of office can, as has been seen, only be arranged through the application to individual members of the Council of Ministers of whatever arrangements national political systems make for ministerial responsibility; or, indeed, through a spill-over, so far untested to the best of my knowledge, from Council decision-making to domestic electoral competition. Sanction through the denial of policy outcomes may, however, be best arranged through the European Parliament. As things stand, national parliaments may be individual veto-holders where the Council of Ministers votes by unanimity; and they may be veto-holders in combination where the Council votes by QMV. The latter, though, is a somewhat capricious controlling power, since it depends on those who happen to have an interest in exercising control happening to be those with mandating powers over the behaviour of their governments in the Council. The need to look to the EP to sanction by denying policy outcomes might point to further extensions in legislative Co-decision or – as was attempted by the Constitution – full Co-decision over the budget. It might also suggest more Co-decision in the making of specific appointments and even in the setting of mandates for particular agencies where policy execution is not delegated to the Commission. Finally, sanction through loss of reputation – through plain political embarrassment – might be reinforced through the development of a fierce culture of political interrogation at either level. Surely there is scope here for both national parliaments and the European Parliament to make greater and more co-ordinated use of committees of enquiry into policy failures and the contribution, if any, of Council decisions to them.

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